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Supreme Court of the United States

OCTOBER TERM, 1933

No. [redacted] /

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CHARLES W. PIERSON,
Counsel for Respondent.

CORPORATE PRESS, INC., NEW YORK CITY

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Supreme Court of the United States

OCTOBER TERM, 1933

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,
Petitioners,
against
THE PEOPLE OF THE STATE OF NEW YORK, upon the Relation of ELIZABETH PIERSON.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Official Report of Opinions Delivered.

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, is reported in 237 App. Div. 763. The affirmance is reported without opinion in 263 N. Y. (Mem.) 19.

Statement of Case.

The respondent instituted a certiorari proceeding under the provisions of the Tax Law of the State of New York (Sections 375, 199) to review a determination of the State Tax Commission assessing an additional income tax against the relator for the Calendar Year 1928. The order of the Appellate Division, Third Judicial Department included the annulment of the determination of the State Tax Commis-

sion imposing an income tax on rentals from Ohio real estate (R. 18-21). The petitioners appealed to the Court of Appeals from so much of the order of the Appellate Division as annulled such determination.

In 1928 the relator, a native of Ohio, residing in New York, received rental income of $2,223.72 from some Cincinnati real estate inherited from her father (R. 15, 16). She did not include these rentals as taxable income in her New York Income Tax Return, claiming that they were not taxable by the State of New York (R. 10b, Exhibit 2). The State Tax Commission ruled that they were taxable and assessed a tax of 2% upon these specific rentals (R. 12a, Exhibit 4). The Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, annulled the assessment and held that the rental income in question might not be included by the State of New York as a part of the relator's income for the purposes of income tax. The final order was unanimously affirmed by the Court of Appeals without opinion (R. 23, 24).

Argument.

The petitioners seek a writ of certiorari to the Supreme Court of the State of New York upon the ground that the proceeding has drawn into question the validity of Section 351 of the New York Tax Law; that the question presented has not been decided by this Honorable Court and that the Courts below misapplied and misconstrued the scope and effect of this Honorable Court's decision in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, on rehearing 158 U. S. 601.

I.

The record does not show that a federal question was expressly or necessarily decided by the state court.

It does not affirmatively appear that the Appellate Division of the New York Supreme Court, Third Judicial Department, ever passed upon the federal questions on which counsel for the petitioners base the application for the writ, or that the decision of these federal questions was necessary to the decision in this case.

Mellon v. *O'Neil,* 275 U. S. 212.

An independent ground (the proper construction of the New York taxing act) existed and was urged upon the attention of the New York Court of Appeals as will appear from the following quotation from respondent's brief in that Court:

> "* * * we do not dispute appellants' proposition (Point IV of Appellants' Brief) that a statute is entitled to a presumption of constitutionality. In this case it is not necessary to attack the constitutionality of the New York Tax Law but only the construction sought to be put upon that statute by the Tax Commissioners. While the language of Section 351 imposing an income tax on residents ('entire net income') is general in form, it should, under well recognized principles, be construed as relating only to matters within the jurisdiction of the law-making body. Section 351 is not the only provision of the New York Tax Law where this principle of construction must be applied. For example, Section 3 provides that 'all personal property situated or owned within this State' is taxable, and Section 8 provides that 'every person shall be taxed in the tax district where he resides * * * for all personal property owned by him or under his control.' The language of these two sections is general, but no one supposes that it covers tangible property having a definite situs outside the State. See, e. g., Hoyt v. Commissioners of Taxes, 23 N. Y. 224."

The opinion of the Appellate Division indicates that the majority of that Court took this view (R. 19). The Court of Appeals affirmed without opinion.

It is respectfully submitted that the petitioners' application for a writ of certiorari should be denied.

CHARLES W. PIERSON,
Counsel for Respondent.